



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hughes Georgia, Inc.

File: B-272526

Date: October 21, 1996

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DIGEST

1. Protest that agency improperly failed to perform technical evaluation is denied where the only stated evaluation criteria were price and past performance risk.
2. Protest that agency improperly referred agency determination of small business offeror's lack of production capability to Small Business Administration for consideration under certificate of competency procedures is denied where inadequate production capability was the basis of the agency's nonresponsibility determination and was not part of the technical evaluation.
3. In solicitation for fixed-price contract in which evaluation scheme provided for use of price analysis techniques, agency reasonably concluded that awardee's prices were reasonable based on comparison of competitive offers, prior contracts for the same items, and independent government estimate.
4. In procurement where price is more important than past performance risk, price/technical tradeoff is unobjectionable where agency reasonably concludes that low past performance risk rating is not worth significant price premium (22 percent) and awards to low-price offeror with neutral past performance rating.

DECISION

Hughes Georgia, Inc. protests the award of a contract to Ainslie Corporation under request for proposals (RFP) No. DAAH01-96-R-0020, issued by the U.S. Army Missile Command (MICOM) for TOW missile night sights. Hughes contends that the

agency's evaluation and award determination were flawed and that it improperly referred the issue of Ainslie's responsibility to the Small Business Administration (SBA).¹

We deny the protest.

The RFP contemplated award of a firm, fixed-price contract for basic and optional quantities of two types of TOW missile night sights (AN/UAS 12C and AN/UAS 12A sights) plus first articles, related cable assemblies, and basic sight assemblies (BSA). The basic quantities were in support of foreign military sales to four countries, while the cable assemblies and BSAs were for U.S. military spares.

The solicitation called for offerors to complete the RFP package (prices, representations, and certifications) and to furnish information on past contracts. MICOM states that it possesses a stable, reliable technical data package (TDP) and for this reason did not require offerors to submit technical proposals. The RFP called out only two evaluation factors: price and past performance risk, with price identified as being "slightly more important" than past performance risk. Award was to be made to the offeror whose proposal provided the best value to the government. The RFP stated that the agency reserved the right to award on the basis of initial proposals without conducting discussions or requesting best and final offers.

Three offerors, including Ainslie and Hughes, submitted offers by the March 28, 1996, closing date for receipt of proposals. None had any proposal deficiencies. The past performance risk evaluation was based on information submitted by the offerors, and proposals were rated in this respect as "low," "moderate," "high," or, in the absence of relevant performance history, "unknown." A proposal risk analysis group (PRAG) reviewed the offerors' past performance information and contacted the references listed to determine the relevance of each listed contract. From its evaluation, the PRAG found that Hughes and the third offeror had performed relevant contracts (with the same or similar requirements and of comparable dollar value) and concluded that both offerors' proposals should be rated as presenting a "low" risk. Using the same standard, the PRAG found that none of Ainslie's contracts was relevant and thus rated Ainslie's proposal as presenting an "unknown" risk. The RFP provided that an unknown rating would be considered "neutral and acceptable."

¹The protester submitted a number of arguments in support of these and other protest grounds; the agency responded to each argument, justifying its actions. We have reviewed the entire record, considered all of the arguments, and find no basis for sustaining the protest. However, we will discuss only the more significant arguments in this decision.

The price evaluation was based on the aggregate price proposed for all first article, production quantity, and option quantity contract line items. The agency compared the offeror's proposed prices with each other, against an agency estimate, and against prior contracts for the same items, and found all proposed prices were reasonable.

The contracting officer, as the source selection authority (SSA), reviewed the findings of the price evaluators and the PRAG. The SSA, noting that Ainslie had proposed the lowest aggregate price and had a neutral past performance rating while Hughes had a higher price but a better past performance rating, preliminarily determined that the \$4.4 million price premium associated with Hughes's proposal made Ainslie's proposal the best value to the government.

The contracting officer then ordered that a pre-award survey be conducted at Ainslie's facility. In addition to personnel from the cognizant Defense Contract Management Center (DCMC), MICOM sent four individuals (not part of the proposal evaluation team) to act as technical observers. The consensus of DCMC and the MICOM personnel was that Ainslie lacked the technical expertise and necessary equipment to perform the contract and recommended no award be made to Ainslie.² The contracting officer then prepared a determination finding Ainslie nonresponsible.

Since Ainslie is a small business, the contracting officer referred the matter to the SBA to consider under the certificate of competency (COC) procedures. The contracting officer sent the SBA copies of the RFP, applicable drawing packages and specifications, the pre-award survey report and findings, an abstract of the proposals, and a statement from the Director, Weapon Systems Management Directorate at MICOM detailing the Director's opinion of Ainslie's lack of capability to perform the contract. After reviewing this material, the SBA issued a COC for Ainslie. Based upon the SBA's finding that Ainslie was responsible, and the review of the evaluation record, the contracting officer again found that Ainslie's proposal represented the best value and awarded it the contract for \$10,543,644. Upon receiving notice of the award and a debriefing, Hughes filed this protest challenging the agency's evaluation of Ainslie's proposal and the agency's award decision.

²One of the MICOM technical personnel found there was a high risk that Ainslie might not meet the first article acceptance date, but otherwise was convinced that Ainslie possessed sufficient positive attributes to outweigh that risk. He recommended that Ainslie receive the award.

Evaluating the relative merits of competing proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden resulting from a defective evaluation. Advanced Technology and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230; Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16. Consequently, we will not reevaluate proposals but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation factors. MAR Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367. An offeror's mere disagreement with the agency does not render the evaluation unreasonable. Medland Controls, Inc., B-255204; B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260. Our review of the record provides no basis for objecting to the agency's evaluation.

Hughes first argues that the agency failed to follow the stated evaluation criteria. Noting that past performance risk was a crucial evaluation factor in this best value procurement, Hughes contends that the agency effectively ignored this evaluation factor by giving Ainslie's proposal a "neutral" rating for past performance since Ainslie lacked any experience with the night sights.

The RFP in section M provided only two evaluation criteria: price and past performance risk. With regard to past performance, offerors were required to submit current and past performance information for up to five contracts received or performed during the past 5 years for the same or similar hardware and effort required by the RFP. The agency's past performance risk assessment was to be based on each offeror's current and past record of performance as it related to the probability of successful accomplishment of the required effort. In the absence of "any relevant past or current performance history during the past 5 years, the offeror's proposal [would] be considered unknown for performance risk evaluation" purposes. In section L-25, instructions for proposal preparation, the RFP provided for offerors to submit information on previous contracts received or performed in the past 5 years "for the same or similar hardware and effort required by this solicitation."

While there was no specific definition of "relevant" past performance in the RFP, reading the evaluation provisions in section M together with the proposal instructions in section L makes it clear that "relevant" past performance history consists of past or current history concerning the "same or similar hardware" to that being procured. Here, the agency reviewed the information submitted by Ainslie and found that it had never before produced electronic-optical items which were the same as or similar to the solicited night sights and none of the contracts that it had performed were of comparable size or value. Based on this evaluation, the agency reasonably concluded that Ainslie lacked any relevant past performance history. Having found no relevant history, under the evaluation scheme the agency was precluded from evaluating Ainslie's past performance as anything other than

"unknown" and, therefore, "neutral."³ Thus, the agency precisely followed, rather than ignored, the stated evaluation scheme.

Hughes next argues that since Ainslie lacked experience with producing night sights, the agency should have found Ainslie's proposal technically unacceptable. However, the RFP did not require such experience and did not provide for the evaluation of such experience. In this regard, offerors were required to submit only price and past performance information. Thus, except to the extent that specific experience was encompassed by the past performance criterion and was to be considered under that criterion, the agency was precluded from rejecting Ainslie's proposal on the basis of its lack of experience. To the extent Hughes is arguing that the evaluation scheme should have included additional evaluation criteria, its challenge is untimely. Protests of solicitation improprieties must be raised prior to the closing time for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1996).

In a related argument, Hughes contends that the pre-award survey team's finding that Ainslie lacked the technical expertise and equipment necessary to perform the contract constituted a determination that Ainslie's proposal was technically unacceptable. Hughes maintains that the participation of four MICOM technical personnel transformed the purported responsibility survey into a technical acceptability evaluation. Thus, in Hughes's view, referral to the SBA was improper. This argument is without merit.

The findings of the pre-award survey that Ainslie lacked the necessary production, technical equipment, and facilities for contract performance, or the ability to obtain them, concern Ainslie's responsibility. Federal Acquisition Regulation (FAR) § 9.104-1(f). While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement when the agency's needs warrant a comparative evaluation of those areas, Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145, here the RFP did not include technical evaluation factors. Thus, neither the inclusion of agency technical personnel in the conduct of the pre-award survey nor the recommendation of "no award" based on Ainslie's lack of expertise

³While Hughes contends that the agency should have evaluated Ainslie's past performance as other than "unknown," it does not allege and the record does not disclose any negative past performance information about Ainslie. All of Ainslie's listed contracts were started and completed (or projected to be completed) on time at the contracted price. Since such past performance was favorable and its consideration would have entitled Ainslie to receive something better than a neutral risk rating, Hughes certainly was not prejudiced by the agency's rating of Ainslie's proposal as "neutral."

and equipment could arguably convert this clear responsibility process into a technical evaluation or have the effect of obviating Ainslie's obligation to meet the requirements of the SOW.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1994), agencies may not find that a small business, such as Ainslie, is nonresponsible without referring the matter to the SBA, which has final authority to determine the responsibility of small business concerns. Joanell Labs. Inc.; Nu-Way Mfg. Co., Inc., 71 Comp. Gen. 348 (1992), 92-1 CPD ¶ 369. Thus, when the contracting officer determined that Ainslie was nonresponsible, the proper course of action was referral of the matter to the SBA. Since the SBA has exclusive jurisdiction to determine the responsibility of a small business, our Office generally does not review either the contracting officer's decision to refer a responsibility question to the SBA, or the SBA's decision to issue a COC.⁴ See 4 C.F.R. § 21.5(b)(2); MRL, Inc.--Recon., B-235673.4, Aug. 29, 1989, 89-2 CPD ¶ 188.

Hughes next contends that the agency's price analysis was flawed. Based on its own expertise in producing the night sights, Hughes argues that the agency should have found that Ainslie's prices were not reasonable because they were unrealistically low. Had the agency evaluated the realism of Ainslie's prices, Hughes argues, it would have concluded that Ainslie lacked an understanding of the contract's requirements.

Generally, cost realism (a measurement of the likely cost of performance in a cost reimbursement contract) is not a factor in the evaluation of proposals when a fixed-price contract is to be awarded, since the government's liability is fixed, and the risk of cost escalation is borne by the contractor. PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366. While an agency may provide for a price realism analysis in the solicitation of fixed-price proposals, id., where, as here, no provision is made, there is no requirement for a realism analysis.

The RFP provided for the evaluation of prices using "price analysis techniques." "Price analysis" is defined as the "process of examining and evaluating a proposed

⁴Hughes argues that our Office should review the matter because the agency withheld vital information from the SBA. See Joanell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207. Hughes contends that the agency withheld "vital" information concerning alleged unrealistically low pricing proposed by Ainslie. However, as discussed below, the agency did not evaluate Ainslie's prices as unreasonably or unrealistically low. Hughes's own assessment of its competitor's pricing strategy does not qualify as "vital" information. The record provides no basis to conclude that the agency in any way misled the SBA.

price without evaluating its separate cost elements and proposed profit." FAR § 15.801 (FAC 90-32). The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. These techniques may include one or more techniques such as comparison of proposed prices by the offerors, comparison of prior proposed prices for the same items, and comparison with an independent government cost estimate. FAR § 15.805-2.

Here, the agency used these three techniques to evaluate Ainslie's proposed prices. While Ainslie's price overall was lower than Hughes's by more than \$4 million, this was primarily due to Ainslie's lower unit prices for the production units. For first articles for the AN/UAS 12c and their subsequent overhaul, the BSAs, and cable assemblies, Ainslie's prices were the highest of all those proposed. Ainslie's unit prices also were 5 to 15 percent higher than those under Hughes's and its team member's prior contracts for the same items. While Ainslie's price was lower than the government's estimate by 10 to 11 percent, the agency explains that these differences were well within the 15-percent (up or down) margin of error in the estimate. Under these circumstances, we see no basis to object to the agency's conclusion that Ainslie's prices were reasonable.

Hughes contends that the agency's evaluation also failed to take into account the fact that Hughes lost money on its contract and that Ainslie's prices are not high enough to make up the difference, especially in view of Ainslie's lack of experience, and that the agency failed to consider the drastic price increase in germanium, which is used in the production of the night sights. In essence, Hughes is simply arguing that Ainslie has submitted a below cost offer. However, the submission of a below cost offer is not itself legally objectionable. See H. Angelo & Co., Inc., B-244682.2, Oct. 30, 1991, 91-2 CPD ¶ 407. Whether a contract can be performed at the offered price is a matter of the offeror's responsibility. Virginia Mfg. Co., Inc., B-241404, Feb. 4, 1991, 91-1 CPD ¶ 113. In this regard, the pre-award survey team found that Ainslie possessed sufficient financial capability to perform the contract and the SBA conclusively determined that Ainslie was responsible to perform.⁵ Further, neither Hughes's mere disagreement with the agency's judgment nor its identification of alternative price evaluation methods available to the agency establish that the price evaluation was unreasonable. See Payco Am. Corp., B-253668, Oct. 8, 1993, 93-2 CPD ¶ 214.

Finally, Hughes challenges the agency's price/technical tradeoff determination as unreasonable and insupportable based upon its contentions that Ainslie's proposal was technically unacceptable and offered unreasonably low prices. Since we find no errors in the price or past performance risk evaluations, these contentions

⁵In addition, after the award of the contract the agency verified that Ainslie had a supplier and a firm price for germanium.

provide no basis for overturning the award determination and we find no other basis for objecting to the selection decision.

Since the RFP provided that the government could select an offeror for award whose price was not necessarily the lowest, but whose total proposal was most advantageous to the government, the SSA was required to determine whether Hughes's past performance rating was worth the higher price associated with Hughes's proposal. See Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115. In making her determination of best value, the contracting officer considered that Ainslie's lower price was slightly more important than its unknown past performance risk and that the SBA had determined that Ainslie was responsible.⁶ She determined that a justification could not be made for paying Hughes's higher price to obtain the associated lower performance risk. Such a determination is within the sound discretion of selection officials, subject to objection only if the determination is unreasonable or inconsistent with the evaluation criteria. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Here we see nothing unreasonable with this determination or inconsistent with the evaluation criteria. Accordingly, we have no basis to object to the contracting officer's selection of Ainslie's proposal.

The protest is denied.

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⁶Hughes apparently would have the contracting officer use the pre-award survey to disqualify Ainslie. However, as discussed above, the survey assessed Ainslie's responsibility. Once the SBA issued Ainslie a COC, the issue of Ainslie's responsibility was conclusively determined, thereby making improper any negative use of the survey in the tradeoff analysis.